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## THE OPERATION OF ELECTRIC STREET RAILWAYS WITHOUT COMPENSATION TO ABUTTING OWNERS.

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BY HARRY G. DAY, YALE LAW SCHOOL.

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The problem of determining what uses of the public streets entitle the abutting owners to compensation, while not new in itself, is constantly recurring in new phases. This is due in a large degree to the variety of uses to which our streets are subjected, incident to the constant growth and development of our large cities;—the perfection of our telegraph, telephone, sewer and rapid transit systems constituting the principal servitudes not contemplated in the original grant of the easement.

It is doubtless true that the public, operating through its representative body, the Legislature, has the power to restrict or delegate its authority over streets in any way it sees fit, and, as a necessary incident to this power, it might “release the public right by vacating the highway, modify the public use by granting a right to use the highway for a horse-railroad, or restrict the public use by granting a right to erect poles or other obstructions in the highway.”<sup>a</sup>

In the discussion of this question, however, it is assumed that there is no express grant of power further than what is necessary for the construction of the railroad itself, and that it does not follow by necessary implication that this includes the right to erect poles, wires and other appurtenances.

It seems to be well settled in this country, that the right to construct and operate a horse-railroad in the ordinary manner, travel and communication being thus facilitated, is clearly a proper use of the highway, and it has been generally held that the abutting owner is entitled to no compensation for damage resulting from this use whether the fee is in the public or not.<sup>b</sup>

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<sup>a</sup> Domestic Tel. & Teleph. Co. v. Newark, 49 N. J. L. 344.

<sup>b</sup> See note to 14 Am. St. Rep. 569.

In view of this uniformity of decision in the case of horse-railroads, and the obvious similarity in principle, it can hardly be doubted that electric roads, operated by the so-called storage battery system, would likewise be exempt from the payment of damages. The question then is reduced to this: Are the poles and wires, necessary for the successful operation of the so-called trolley system a burden sufficient to entitle the abutting owners to compensation?

As the slight obstruction to the *public* use of the street, which necessarily results from the erection of poles and wires, is a strictly public damage for which the people should seek their remedy through the Legislature, it would be well to eliminate that feature of the question, and determine simply whether the placing of poles in the street is a taking of private property. Nor does it seem necessary to distinguish the cases where the fee is in the city, for this is immaterial. There is no legal cause for complaint so long as abutting owners are unobstructed in the use and enjoyment of their own property.

In the litigation concerning telegraph and telephone poles and wires there is a conflict of authority. In some of the States it is held that they are among the necessary incidents to the public use of the streets, and the right to erect poles and suspend wires in a reasonable manner, is paramount to individual rights and no new servitude.<sup>c</sup> In others it is held differently,<sup>d</sup> the decisions, however, in both cases depend largely on statute.

An attempt has been made to distinguish the case of poles and wires for electric railways from those for telegraph purposes, on the ground that the latter are not used to facilitate the use of the streets for travel and transportation, whereas the former, by communicating the necessary power, are directly ancillary to their use for these purposes. Inasmuch as one of the original uses of land appropriated for a highway was the transmission of intelligence, and as facility of communication would have the natural tendency to obviate in a great measure the necessity of travel, it would seem that this distinction is too fine. And it is significant, that in the very case in which this distinction is drawn, allusion is

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<sup>c</sup> *Pierce v. Drew*, 136 Mass. 75; *Julia Building Ass'c. v. Bell Teleph. Co.*, 88 Mo. 258; *Irwin v. Gt. So. Tel. Co.*, 37 La. Ann. 63.

<sup>d</sup> *W. U. Tel. Co. v. Williams*, 11 S. W. Rep. (Va.) 106; *Broome v. N. Y. & N. J. Teleph. Co.*, 42 N. J. Eq. 141; *Roake v. Am. Teleph. Co.*, 41 N. J. Eq. 35; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507; *Dusenbury v. Mut. Union Tel. Co.*, 11 Abb. New Cases (N. Y.) 440.

made to the fact "that a telegraph erected by a railroad company within its location, for the purposes of its railroad, to increase the safety and efficiency thereof, does not constitute an additional servitude, but is only a legitimate development of the easement originally acquired." <sup>e</sup>

On the whole, therefore, it seems best to discuss the subject of this article independently of the telegraph and telephone.

In the elevated railroad cases in New York it was held that the erection in the street of iron posts, necessary for the support of the tracks, was not a taking of private property, but compensation was granted on account of interference with the easements of light and air and possibly access. <sup>f</sup>

These cases are referred to because the same principles apply as well in the case of poles used for the purpose of supplying motive power, as for the support of the tracks, but in the former case it is evident that no damages could be collected, because there is no interference with the easements of light and air, and, with a little care in placing, interference with the right of access can be avoided.

We now come to the cases on the exact question.

In *Mt. Adams and Eden Park Inclined Ry. Co. v. Winslow et al.*, <sup>g</sup> it was held that the change in motive power did not change the essential character of the road, nor did it materially increase the servitude; and that poles along the margin of the side-walk should remain, as they were no more of an obstruction to abutting owners' land than shade-trees, lamp-posts, hitching-posts and other similar structures which have been tolerated for centuries.

In *Pelton v. The East Cleveland R. R. Co.*, <sup>h</sup> this case was cited and approved, and an ordinance giving the right to use all necessary appliances for conducting electricity, was held valid. On appeal to the Circuit Court, the attempt to obtain an injunction, on the ground that the running of cars by electricity was a public nuisance, failed.

The Supreme Court of Rhode Island in *Taggart v. Newport S't. R'y. Co.*, <sup>i</sup> held that the act of incorporation, authorizing the use

<sup>e</sup> Per Durfee, C. J., in *Taggart v. Newport St. Ry. Co.*, 16 R. I. 668.

<sup>f</sup> *Story v. N. Y. El. R. R. Co.*, 90 N. Y. 122; *Lahr v. Met. El. R. R. Co.*, 104 N. Y. 268; *N. Y. Nat. Bank v. Met. El. R. R. Co.*, 108 N. Y. 660; *Pond v. Met. El. R. R. Co.*, 112 N. Y. 186.

<sup>g</sup> 3 Ohio Circ't. Ct. Rep. 425. (1888).

<sup>h</sup> 22 Weekly Bulletin and Ohio Law Journal, 67 (1889).

<sup>i</sup> 16 R. I. 668.

of electricity for the operation of a street railroad and the erection of poles as ancillary thereto, does not impose any new servitude upon the land, nor did it obstruct the streets within the clause of the charter forbidding the encumbrance of any portion not occupied by the tracks, such poles not being an encumbrance, but a necessity, and greatly facilitating the *use* of the street as a public way.

This decision was approved in *Louisville Bagging Mfg. Co. v. The Central Pass. R'y. Co.*<sup>j</sup>

In *Loneragan v. Lafayette S't. R'y. Co.*,<sup>k</sup> it was held that the Legislature, in the act "to provide for the incorporation of street railroad companies," probably contemplated new inventions, and no new servitude was imposed upon the land.

In Michigan, companies are authorized by statute to propel the cars by "steam or other power," under the authority of the municipality. The city council of Detroit by ordinance authorized the use of electricity. In *Detroit City Railway v. Mills*<sup>l</sup> it was held that this did not impose such a new burden and servitude as to entitle abutting owners to compensation. The authority of this case is weakened however, by vigorous dissenting opinions of two of the judges, on the ground that any street railway, whether operated by animal power, electricity or steam, is a new burden, and, although a public necessity, one which should be supplied at public expense. The weight of authority against the extreme views expressed by the dissenting judges, is so strong, that it does not seem worth while to consider them at greater length in the limitations of this article.

The same question was again alluded to in the later case of *Nichols v. The Ann Arbor & Ypsilanti S't. R'y. Co.*<sup>m</sup> The same judges again dissented, and a third did not concur in that part of the opinion which stated that it was settled law in that State, that a street railway operated by steam or electricity is not an additional servitude.

In *Halsey v. Rapid Transit S't. R'y. Co.*,<sup>n</sup> it was held that the general authority to maintain and operate a street railway, no express words of limitation being used, will carry with it, by necessary implication, all such powers as are reasonably necessary

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<sup>j</sup> *Louisville Law and Equity Court*, June, 1890.

<sup>k</sup> *Circuit Court of Lafayette County, Ind.*, July, 1890.

<sup>l</sup> 85 Mich. 634.

<sup>m</sup> 87 Mich. 361.

<sup>n</sup> 47 N. J. Eq. 380.

for the successful operation of an electric railroad, in the present state of electrical science, and as poles and wires are reasonably necessary to carry on its business successfully, the right to erect them is clearly within this implied power.

This was followed by the case of *Lockhart v. Craig S't. R'y. Co.*,<sup>o</sup> in which it was held that the operation of an overhead electric system was a proper use of the streets, and imposed no new burden on the soil.

Finally in the very recent case of *Koch v. North. Ave. R'y. Co.*,<sup>p</sup> the Court, after citing some of the above decisions, states as a settled rule of law that the use of electricity imposes no new servitude.

In this brief discussion it has been shown that the Courts are decidedly opposed to granting compensation in this and analogous cases. Taking a somewhat narrow view of the matter it might be argued that, strictly speaking, the use of our streets for all purposes of so-called public improvement, without regard to the rights and feelings of abutting owners, and particularly the erection of unsightly poles and wires, could not possibly have been seriously contemplated, or even considered by the original grantors of the easement, and is not perhaps strictly justifiable.

The undoubted tendency of the courts however, has been to take a much broader view of the matter, with the result of subordinating strictly private right to public necessity. And with the increased necessities of our growing cities this view seems on the whole the most reasonable. Rapid transit in particular is as indispensable to their progress as light, sewerage and water, and a system which is clean, quiet, cheap, easily controlled and occupying as little space as possible is universally demanded. It has been conclusively proved by common experience, that the electric system has, under favorable circumstances, perhaps all of these requisites. By it business men, clerks, working men and women are swiftly carried from the suburbs, where they have cheap and comfortable homes, to their respective places of business.

From the point of view of the public, these reasons clearly outweigh the slight irritation that may be caused to the artistic eye of the abutting owner by the erection of the necessary appurtenances.

But on the other hand the advantage is not all on the side of the public. In the construction and operation of an electric street

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<sup>o</sup> 139 Penn. St. 419.

<sup>p</sup> 23 Atl. Rep. (Md.) 463. (Jan. 1892).

railway, nothing is taken which is of itself and alone intrinsically valuable, but only as its loss affects the adjoining land. Where however it can be shown, as in fact can be done in the majority of cases, that, by reason of the location of the road, the abutting owner has been specially and peculiarly benefitted, his property being in actual fact worth several per cent more than it was before, there is no loss affecting the value of the land, but, on the contrary, a positive benefit. It would then be the greatest injustice to award to an owner damages, which in fact he never sustained. To permit a recovery of this conjectural and wholly theoretical damage, in spite of the obvious benefits conferred, would be to legalize a mere raid on the treasury of the unfortunate victims.